

**DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
THE CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143**

PETITIONER:

Employer Account No. - 2758412
SHERYL A FERGUSON PSY D PA
1040 BAYVIEW DRIVE SUITE 517
FT LAUDERDALE FL 33304-2542

RESPONDENT:

State of Florida
DEPARTMENT OF ECONOMIC
OPPORTUNITY
c/o Department of Revenue

**PROTEST OF LIABILITY
DOCKET NO. 2012-111418L**

ORDER

This matter comes before me for final Department Order.

Having fully considered the Special Deputy's Recommended Order and the record of the case and in the absence of any exceptions to the Recommended Order, I adopt the Findings of Fact and Conclusions of Law as set forth therein. A copy of the Recommended Order is attached and incorporated in this Final Order.

In consideration thereof, it is ORDERED that the determination dated September 5, 2012, is REVERSED.

JUDICIAL REVIEW

Any request for judicial review must be initiated within 30 days of the date the Order was filed. Judicial review is commenced by filing one copy of a *Notice of Appeal* with the DEPARTMENT OF ECONOMIC OPPORTUNITY at the address shown at the top of this Order and a second copy, with filing fees prescribed by law, with the appropriate District Court of Appeal. It is the responsibility of the party appealing to the Court to prepare a transcript of the record. If no court reporter was at the hearing, the transcript must be prepared from a copy of the Special Deputy's hearing recording, which may be requested from the Office of Appeals.

Cualquier solicitud para revisión judicial debe ser iniciada dentro de los 30 días a partir de la fecha en que la Orden fue registrada. La revisión judicial se comienza al registrar una copia de un *Aviso de Apelación* con la Agencia para la Innovación de la Fuerza Laboral [*DEPARTMENT OF ECONOMIC OPPORTUNITY*] en la dirección que aparece en la parte superior de este *Orden* y una segunda copia, con los honorarios de registro prescritos por la ley, con el Tribunal Distrital de Apelaciones pertinente. Es la responsabilidad de la parte apelando al tribunal la de preparar una transcripción del registro. Si en la audiencia no se encontraba ningún estenógrafo registrado en los tribunales, la transcripción debe ser preparada de una copia de la grabación de la audiencia del Delegado Especial [*Special Deputy*], la cual puede ser solicitada de la Oficina de Apelaciones.

Nenpòt demann pou yon revizyon jiridik fèt pou l kòmanse lan yon peryòd 30 jou apati de dat ke Lòd la te depoze a. Revizyon jiridik la kòmanse avèk depo yon kopi yon *Avi Dapèl* ki voye bay DEPARTMENT OF ECONOMIC OPPORTUNITY lan nan adrès ki parèt pi wo a, lan tèt Lòd sa a e yon dezyèm kopi, avèk frè depo ki preskri pa lalwa, bay Kou Dapèl Distrik apwopriye a. Se responsabilite pati k ap prezante apèl la bay Tribinal la pou l prepare yon kopi dosye a. Si pa te gen yon stenograf lan seyans lan, kopi a fèt pou l prepare apati de kopi anrejistreman seyans lan ke Adjwen Spesyal la te fè a, e ke w ka mande Biwo Dapèl la voye pou ou.

DONE and ORDERED at Tallahassee, Florida, this _____ day of January, 2013.



Altemese Smith,
Assistant Director,
Reemployment Assistance Services
DEPARTMENT OF ECONOMIC OPPORTUNITY

FILED ON THIS DATE PURSUANT TO § 120.52,
FLORIDA STATUTES, WITH THE DESIGNATED
DEPARTMENT CLERK, RECEIPT OF WHICH IS
HEREBY ACKNOWLEDGED.

Shanendra Y. Barnes

DEPUTY CLERK

DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Final Order have been furnished to the persons listed below in the manner described, on the _____ day of January, 2013.

Shanendra Y. Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC
OPPORTUNITY
Reemployment Assistance Appeals
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

By U.S. Mail:

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VICKIE SANCHEZ
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DEPARTMENT OF REVENUE
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State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

DEPARTMENT OF ECONOMIC OPPORTUNITY

Reemployment Assistance Appeals

MSC 347 CALDWELL BUILDING

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**PROTEST OF LIABILITY
DOCKET NO. 2012-111418L**

RESPONDENT:

State of Florida
DEPARTMENT OF ECONOMIC
OPPORTUNITY
c/o Department of Revenue

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director,
Executive Director,
Reemployment Assistance Services
DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated September 5, 2012

After due notice to the parties, a telephone hearing was held on November 29, 2012. The Petitioner, represented by the Petitioner's President, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Joined Party did not appear.

The record of the case, including the recording of the hearing and any exhibits submitted in evidence, is herewith transmitted. Proposed Findings of Fact and Conclusions of Law were not received.

Issue:

Whether services performed for the Petitioner by the Joined Party constitute insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes.

Findings of Fact:

1. The Petitioner is a corporation that was formed in 2003 to provide psychological counseling services. The Petitioner's services are primarily furnished under contracts with various governmental agencies. After a client is referred to the Petitioner by an agency and the Petitioner performs an initial assessment of the client, the Petitioner is required to complete and submit a report to the referring agency.

2. The Joined Party performed typing services for the Petitioner from May 19, 2011, until June 2012. The Petitioner's president told a friend she was looking for someone to type reports and the friend referred the Joined Party to the Petitioner. The Petitioner told the Joined Party the amount of work would vary depending on the number of agency referrals. The Joined Party told the Petitioner that she had a bail bond business and was also a realtor. The parties verbally agreed that the Joined Party would perform the work as an independent contractor. The Joined Party was required to sign a confidentiality agreement concerning the safeguarding of client information.
3. The Joined Party told the Petitioner she had prior clerical experience. The Petitioner did not provide any training to the Joined Party.
4. The Petitioner purchased a portable notebook device and developed a template for the report. The Joined Party used the notebook device and template to type reports from handwritten notes provided by the Petitioner. The Joined Party performed the work at various office suites leased by the Petitioner and, occasionally, at the home of the Petitioner's president. When work was available the Petitioner's president met the Joined Party at an agreed-upon location to open the office. The Joined Party refused to work at the Petitioner's Fort Lauderdale office because of the travel distance involved. The Petitioner did not permit the Joined Party to remove the notebook device or notes from the office due to concerns about client confidentiality. The Joined Party did not have a key to any of the Petitioner's office locations.
5. The Joined Party did not have set hours for work. The parties mutually agreed upon a day and time for the Joined Party to perform her work. The Joined Party determined the number of hours worked and left at her convenience. If the Petitioner's president was out of the office when the Joined Party decided to leave, the Joined Party placed the notebook device and case notes in a secure location and locked the office door. The Joined Party had the right to conduct her bail bond and real estate activities while working at the Petitioner's locations.
6. The Joined Party could accept or decline work. If the Joined Party was unavailable to type reports, the Petitioner's president typed the reports.
7. The Petitioner did not supervise the Joined Party's work.
8. The Joined Party was paid \$10 or \$15 per report. The Joined Party entered the client's name and date of birth in a log when she completed a report. The Petitioner paid the Joined Party at the end of the week for reports completed. The Petitioner did not withhold taxes from the Joined Party's pay. The Petitioner did not provide the Joined Party with any bonuses or fringe benefits. The Petitioner reported the Joined Party's earnings on a form 1099-MISC.
9. The Joined Party was not restricted from working for a competitor of the Petitioner.
10. The Joined Party could not subcontract the work because the Petitioner was concerned about protecting confidential client information.
11. During a period of time when the Petitioner's president was recovering from surgery, the Joined Party assisted the Petitioner with the mailing of marketing materials. The work was performed at the home of the Petitioner's president. The Petitioner paid the Joined Party \$10 per hour, and the duration of that project was approximately 20 hours.
12. Either party could terminate the relationship at any time without penalty or liability for breach of contract.

Conclusions of Law:

13. The issue in this case, whether services performed for the Petitioner constitute employment subject to the Florida Unemployment Compensation Law, is governed by Chapter 443, Florida Statutes. Section 443.1216(1)(2)2, Florida Statutes, provides that employment subject to the chapter includes service performed by individuals under the usual common law rules applicable in determining an employer-employee relationship.
14. The Supreme Court of the United States held that the term "usual common law rules" is to be used in a generic sense to mean the "standards developed by the courts through the years of adjudication." United States v. W.M. Webb, Inc., 397 U.S. 179 (1970).
15. The Supreme Court of Florida adopted and approved the tests in 1 Restatement of Law, Agency 2d Section 220 (1958), for use to determine if an employment relationship exists. See Cantor v. Cochran, 184 So.2d 173 (Fla. 1966); Miami Herald Publishing Co. v. Kendall, 88 So.2d 276 (Fla. 1956); Magarian v. Southern Fruit Distributors, 1 So.2d 858 (Fla. 1941); see also Kane Furniture Corp. v. R. Miranda, 506 So.2d 1061 (Fla. 2d DCA 1987).
16. Restatement of Law is a publication, prepared under the auspices of the American Law Institute, which explains the meaning of the law with regard to various court rulings. The Restatement sets forth a nonexclusive list of factors that are to be considered when judging whether a relationship is an employment relationship or an independent contractor relationship.
17. 1 Restatement of Law, Agency 2d Section 220 (1958) provides:
 - (1) A servant is a person employed to perform services for another and who, in the performance of the services, is subject to the other's control or right of control.
 - (2) The following matters of fact, among others, are to be considered:
 - (a) the extent of control which, by the agreement, the business may exercise over the details of the work;
 - (b) whether or not the one employed is engaged in a distinct occupation or business;
 - (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
 - (d) the skill required in the particular occupation;
 - (e) whether the employer or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
 - (f) the length of time for which the person is employed;
 - (g) the method of payment, whether by the time or by the job;
 - (h) whether or not the work is a part of the regular business of the employer;
 - (i) whether or not the parties believe they are creating the relation of master and servant;
 - (j) whether the principal is or is not in business.
18. Comments in the Restatement explain that the word "servant" does not exclusively connote manual labor, and the word "employee" has largely replaced "servant" in statutes dealing with various aspects of the working relationship between two parties.
19. In Department of Health and Rehabilitative Services v. Department of Labor & Employment Security, 472 So.2d 1284 (Fla. 1st DCA 1985), the court confirmed that the factors listed in the Restatement are the proper factors to be considered in determining whether an employer-employee

relationship exists. However, in citing La Grande v. B&L Services, Inc., 432 So.2d 1364, 1366 (Fla. 1st DCA 1983), the court acknowledged that the question of whether a person is properly classified an employee or an independent contractor often cannot be answered by reference to “hard and fast” rules, but rather must be addressed on a case-by-case basis.

20. The testimony of the Petitioner’s witness established that the parties intended to create an independent contractor relationship. In Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995), the Florida Supreme Court stated that an express agreement between the parties should be honored unless the actual practice of the parties indicates that the agreement is not a valid indicator of status.

21. In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the court held that the basic test for determining a worker’s status is the employing unit’s right of control over the manner in which the work is performed. The court, quoting Farmer’s and Merchant’s Bank v. Vocelle, 106 So.2d 92 (Fla. 1st DCA 1958), stated: “[I]f the person serving is merely subject to the control of the person being served as to the results to be obtained, he is an independent contractor; if he is subject to the control of the person being served as to the means to be used, he is not an independent contractor.”

22. It was not shown in this case that the Petitioner exercised sufficient control over the Joined Party as to create an employer-employee relationship. The Petitioner did not determine when the work was performed, where the work was performed, or how the work was performed. The Joined Party could accept or decline an assignment of work. The Joined Party did not receive any training from the Petitioner. The Joined Party did not have set hours for work. The Joined Party’s work was not supervised. The Joined Party could perform similar services for a competitor of the Petitioner. The Joined Party could attend to other business while working at the Petitioner’s business locations.

23. With the exception of the minor project performed while the Petitioner’s president recovered from surgery, the Joined Party was paid by the job, rather than by time. The Petitioner did not withhold taxes from the Joined Party’s pay. The Petitioner did not provide any fringe benefits to the Joined Party. The Petitioner reported the Joined Party’s earnings as non-employee compensation.

24. It is concluded that the services performed for the Petitioner by the Joined Party do not constitute insured work.

Recommendation: It is recommended that the determination dated September 5, 2012, be REVERSED.

Respectfully submitted on December 20, 2012.

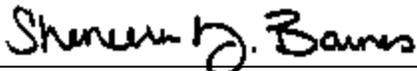


SUSAN WILLIAMS, Special Deputy
Office of Appeals

A party aggrieved by the *Recommended Order* may file written exceptions to the Director at the address shown above within fifteen days of the mailing date of the *Recommended Order*. Any opposing party may file counter exceptions within ten days of the mailing of the original exceptions. A brief in opposition to counter exceptions may be filed within ten days of the mailing of the counter exceptions. Any party initiating such correspondence must send a copy of the correspondence to each party of record and indicate that copies were sent.

Una parte que se vea perjudicada por la *Orden Recomendada* puede registrar excepciones por escrito al Director Designado en la dirección que aparece arriba dentro de quince días a partir de la fecha del envío por correo de la *Orden Recomendada*. Cualquier contraparte puede registrar contra-excepciones dentro de los diez días a partir de la fecha de envío por correo de las excepciones originales. Un resumen en oposición a contra-excepciones puede ser registrado dentro de los diez días a partir de la fecha de envío por correo de las contra-excepciones. Cualquier parte que dé inicio a tal correspondencia debe enviarle una copia de tal correspondencia a cada parte contenida en el registro y señalar que copias fueron remitidas.

Yon pati ke Lòd Rekòmande a afekte ka prezante de eksklizyon alekri bay Direktè Adjwen an lan adrès ki parèt anlè a lan yon peryòd kenz jou apati de dat ke Lòd Rekòmande a te poste a. Nenpòt pati ki fè opozisyon ka prezante objeksyon a eksklizyon yo lan yon peryòd dis jou apati de lè ke objeksyon a eksklizyon orijinal yo te poste. Yon dosye ki prezante ann opozisyon a objeksyon a eksklizyon yo, ka prezante lan yon peryòd dis jou apati de dat ke objeksyon a eksklizyon yo te poste. Nenpòt pati ki angaje yon korespondans konsa dwe voye yon kopi kourye a bay chak pati ki enplike lan dosye a e endike ke yo te voye kopi yo.



SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
December 20, 2012

Copies mailed to:

Petitioner
Respondent
Joined Party

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